Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

MAGGIE MILLER-STOUT,

Petitioner,

v.

ERNEST ALLEN BAILEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For purposes of 28 U.S.C. § 2254(d), is it clearly established federal law that closing arguments violate the Confrontation Clause if the arguments link the defendant to an otherwise properly redacted statement of a non-testifying codefendant?

PARTIES

The Petitioner is Maggie Miller-Stout, the Superintendent of the Airway Heights Corrections Center. The Respondent is Ernest Allen Bailey.

TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 5

1. 28 U.S.C. § 2254(d) Bars Relief If The Claim Is Not Based Upon A Holding Of This Court. 5

2. The Court's Holdings Establish That Only The Admission Of Evidence May Violate The Confrontation Clause. 7

3. The Court Has Not Clearly Established That Closing Arguments Of Counsel May Violate The Confrontation Clause..... 9

4. The State Court Adjudication Was A Reasonable Application Of Federal Law.. 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

Cases

Brady v. Maryland,
373 U.S. 83 (1963) 4

Bruton v. United States,
391 U.S. 123 (1968) 7, 9, 12, 13

Central Green Co. v. United States,
531 U.S. 425 (2001) 6

Cohens v. Virginia,
6 Wheat 264, 5. L. Ed. 257 (1821) 6

Crawford v. Washington,
541 U.S. 36 (2004) 11

Darden v. Wainwright,
477 U.S. 168 (1986) 12

Gray v. Maryland,
523 U.S. 185 (1998) 8, 9

Humphrey's Executor v. United States,
295 U.S. 602 (1935) 6

Lockyer v. Andrade,
538 U.S. 63 (2003) 6

Mickens v. Taylor,
535 U.S. 162 (2002) 6

Ramdass v. Angelone,
530 U.S. 156 (2000) 5

Richardson v. Marsh,
481 U.S. 200 (1987) ..... passim

Rogers v. Tennessee,
532 U.S. 451 (2001) 6

Seminole Tribe of Fla. v. Florida,
517 U.S. 44 (1996) 6

State v. Bailey,
134 Wash.2d 1016, 958 P.2d 315 (1998) 4

Tennessee v. Street,
471 U.S. 409 (1985) 13

Texas v. Cobb,
532 U.S. 162 (2001) 5

United States v. Akinkoye,
185 F.3d 192 (4th Cir. 1999) 8

United States v. Alvarrado,
882 F.2d 645 (2d Cir. 1989),
cert. denied, 493 U.S. 1071 (1990) 7

United States v. Logan,
210 F.3d 820 (8th Cir. 2000) 7

United States v. Miller,
995 F.2d 865 (8th Cir.),
cert. denied, Patterson v. United States, 510 U.S.
1018 (1993) 7

United States v. Quintero,
38 F.3d 1317 (3rd Cir. 1994) 12

United States v. Sandini,
888 F.2d 300 (3rd Cir. 1989) 12

United States v. Solis,
299 F.3d 420 (5th Cir. 2002) 12

United States v. Strickland,
935 F.2d 822 (7th Cir.),
cert. denied, 502 U.S. 917 (1991) 7

United States v. Taylor,
186 F.3d 1332 (11th Cir. 1999) 7

United States v. Verduzco-Martinez,
186 F.3d 1208 (10th Cir. 1999) 7

Williams v. Taylor,
529 U.S. 362 (2000) 5

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 2254 ..... 4, 5, 6, 9

APPENDIX

Description	Page
Opinion, *Bailey v. Miller-Stout*, 134 Fed.Appx. 212 (9th Cir. 2005)	1a
Order Denying Rehearing, *Bailey v. Miller-Stout*, Ninth Circuit Cause No. 04-35852 and 04-36035, filed July 25, 2005	4a
Judgment In A Civil Case, *Bailey v. Miller-Stout*, U.S.D.C. Western District of Washington Cause No. C03-5476RBL	5a
Order Granting Writ of Habeas Corpus, *Bailey v. Miller-Stout*, U.S.D.C. Western District of Washington Cause No. C03-5476RBL	6a
Report And Recommendation, *Bailey v. Miller-Stout*, U.S.D.C. Western District of Washington Cause No. C03-5476RBL	28a
Order Denying Motion To Modify, *In re the Personal Restraint Petition of Ernest Bailey*, Washington State Supreme Court Cause No. 72859-3	66a
Ruling Denying Review, *In re the Personal Restraint Petition of Ernest Bailey*, Washington State Supreme Court Cause No. 72859-3	67a

Order Dismissing Petition, *In re the Personal Restraint Petition of Ernest Bailey*, Washington State Court of Appeals Cause No. 24481-1-II 78a

Unpublished Opinion, *State of Washington v. Ernest Bailey*, Washington State Court of Appeals Cause No. 16832-4-II consolidated with 16833-2-II, 18871-6-II, 19048-6-II 91a

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Maggie Miller-Stout, the Superintendent of the Airway Heights Corrections Center, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unpublished. App. 1a-3a. The court of appeals' order denying the petition for rehearing *en banc* is unpublished. App. 4a. The report and recommendation of the United States Magistrate Judge and the order of the United States District Court for the Western District of Washington are unpublished. App. 5a-65a. The decisions of the Washington Court of Appeals and Washington Supreme Court affirming Bailey's convictions on direct appeal, and denying his post-conviction collateral challenge, are unpublished. App. 66a-121a.

JURISDICTION

The judgment of the court of appeals was first entered on June 17, 2005. App. 1a. On July 25, 2005, the court of appeals denied a timely petition for rehearing *en banc*. App. 4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him...."

STATEMENT

This case involves the issue of whether the Court has clearly established as federal law that the closing arguments of counsel violate the Confrontation Clause if the arguments link the defendant to an otherwise properly redacted statement of a non-testifying codefendant. The lower federal courts answered this question in the affirmative, and granted nabeas relief in favor of Respondent. In doing so, the federal courts relied primarily on two sentences in *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), in which this Court directed the Sixth Circuit consider in the first instance whether a prosecutor's comments can serve as a basis for habeas relief in light of the defendant's failure to object. This language in *Richardson*, however, was not a holding of the Court, and it did not establish the rule applied below. The Court has never established that closing arguments, as opposed to testimonial evidence, may violate the Confrontation Clause. Because the Court has not clearly established the rule applied by the lower federal courts, Respondent is not entitled to relief.

Respondent Ernest Allen Bailey was convicted of murder and conspiracy to commit murder. Bailey, along with fellow gang members Eugene Youngblood and Orlandis Campbell, murdered rival gang members and drug dealers, Lewis Randall and Tyrone Darcheville. In late December 1991, Bailey, Youngblood, and Campbell were charged with the murders of Darcheville and Randall. On December 27, 1991, Youngblood was arrested in Los Angeles, California. Youngblood was brought back to Washington, where he gave a tape recorded statement to the police.

Youngblood and Campbell were tried together. The jury convicted Campbell, but could not reach a verdict on Youngblood. The FBI located Bailey in Los Angeles on July 31, 1992, and Youngblood and Bailey were subsequently tried together. The trial court admitted a redacted version of Youngblood's statement at the joint trial of Youngblood and Bailey.

The redacted statement eliminated any reference to Bailey, replacing such references with neutral pronouns such as "someone", "he" or "they." The state appellate courts, the district court and the Ninth Circuit later found the redacted statement itself did not violate the Confrontation Clause.[1] Prior to introducing the redacted statement, the trial judge gave a limiting instruction, expressly instructing the jury not to consider the statement against Bailey. The prosecutor repeatedly reminded the jury of this instruction. According to Bailey, however, the prosecutor and counsel for Youngblood improperly linked the statement to Bailey during their closing arguments. Bailey objected to the closing arguments, and the trial judge again instructed the jury not to consider the statement against Bailey. The judge also gave standard instructions to disregard arguments to the extent the arguments conflicted with the court's instructions. The jury convicted both Bailey and Youngblood.

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[1] Judge Graber's concurring opinion found the term "homeboy" in the statement referred to Bailey, but the majority opinion of the Ninth Circuit did not adopt this conclusion. App. 1a-3a. The Ninth Circuit, adopting the reasoning of the district court, concluded that the statement was properly redacted, and agreed the state court decision that the redacted statement itself did not violate the Confrontation Clause was a reasonable application of clearly established federal law. App. 2a and 23a.